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R.H., Appellant)	
)	
and)	Docket No. 15-0137
)	Issued: July 17, 2015
DEPARTMENT OF THE INTERIOR, FISH &)	
WILDLIFE SERVICE, MID-COLUMBIA)	
NATIONAL WILDLIFE REFUGE COMPLEX,)	
Burbank, WA, Employer)	
)	

Case Submitted on the Record

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On October 24, 2014 appellant filed a timely appeal from July 25 and August 1, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether OWCP properly denied appellant's request for subpoenas; (2) whether it properly determined that appellant received an overpayment of compensation in the amount of \$3,416.47 for the period May 5 through July 13, 2013 because OWCP based its calculations on incorrect hourly wage information; and (3) whether OWCP properly denied waiver of the recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that an OWCP hearing representative made incorrect calculations, reached improper conclusions, and improperly denied his request for subpoenas. He objected to the hearing representative's statement that he had not been fully transparent in supplying his financial information, and noted that OWCP did not request any clarification. Appellant also argued that a third-party mail contractor did not get the information to OWCP in a timely manner.

FACTUAL HISTORY

On December 27, 2012 appellant, then a 66-year-old engineering equipment operator, filed a traumatic injury claim alleging that, on December 18, 2012, after carrying metal office furniture up and down flights of stairs most of the day, he had moderate pain and swelling in his right knee joint. On March 12, 2013 OWCP accepted his claim for other and unspecified derangement of right medial meniscus.

On April 10, 2013 appellant stopped work and underwent surgery to correct the medial meniscus tear. He returned to full-time limited-duty work on July 14, 2013 and full-time full duty on August 28, 2013. Appellant used leave for the time he initially missed from work but requested compensation covering the time periods from May 5 through July 13, 2013 in five CA-7 forms. The employing establishment listed appellant's hourly pay rate on these forms as \$36.66. This figure was based on a weekly rate of \$1,471.34. However, when appellant requested leave buy-back for the period April 10 through May 4, 2013, the employing establishment calculated an hourly rate of \$25.31. In an e-mail sent on August 19, 2013, a budget technician for the employing establishment confirmed that appellant's hourly wage rate was \$25.31.

On August 30, 2013 OWCP made a preliminary determination that appellant had been overpaid \$2,733.18 for the period May 19 to July 13, 2013 because the calculations concerning his compensation were incorrect as to the hourly wage rate. On September 10, 2013 it issued a corrected preliminary determination, noting an earlier starting date for compensation payments of May 5, 2013. OWCP determined that appellant was overpaid compensation in the amount of \$3,416.47 for the period May 5 to July 13, 2013.² It further determined that he was not at fault in the creation of the overpayment and advised that, if he disagreed with the amount of the overpayment, he had a right to a hearing. OWCP informed appellant that, if he wished to request waiver of the overpayment, he must provide financial information within 30 days. It informed him that, if he did not provide the financial information within 30 days, his waiver request would be denied. OWCP finalized its overpayment determination on October 8, 2013 and a corrected final determination on October 15, 2013.

On October 17, 2013 OWCP received appellant's request for a prerecoupment hearing on the issues of fault and possible waiver of overpayment. Appellant believed the overpayment occurred through no fault of his own and that the supervisor for the employing establishment

² Appellant was entitled to \$1,523.72 for the period May 5 to 18, 2013 and \$6,094.86 for the period May 19 to July 13, 2013, for a total of \$7,618.58. However, he received \$2,207.01 for the period May 5 to 18, 2013, \$4,414.02 for the period May 19 to June 15, 2013, \$2,207.01 for the period June 16 to 29, 2013, and \$2,207.01 for the period June 30 to July 13, 2013, for a total of \$11,035.05.

made numerous errors in policy and judgment. He listed monthly income of \$2,700.00 plus rental income of \$1,000.00 a month. Appellant listed expenses for food of \$300.00 a month, utilities of \$300.00 a month, and other expenses of \$400.00 a month. He noted that he owed Chase Home Mortgage \$12,000.00 (\$600.00 a month payment), Wells Fargo \$9,000.00 (\$300.00 monthly payment), GESA Credit Union \$17,000.00 (\$300.00 monthly payment); and U.S. Bank \$20,000.00 (\$400.00 monthly payment). The total monthly income listed was \$3,700.00 and total expenses were \$2,600.00. On May 19, 2014 appellant submitted supporting documents. He forwarded earnings and leave statements, bank statements, tax information, utility bills, bills regarding automobile expenses, bills regarding rental expenses, medical bills, food receipts, and credit card bills.

By letter dated November 22, 2013, appellant requested that subpoenas be issued for six individuals at the employing establishment.

At the hearing held on May 7, 2014, the hearing representative reviewed appellant's financial documentation.

In a decision dated July 25, 2014, OWCP hearing representative denied appellant's request for subpoenas, finding that appellant "has failed to show what evidence can only be secured by subpoena of the six identified individuals." He also affirmed the corrected determination of an overpayment in the amount of \$3,416.47. The hearing representative also found appellant not at fault in the creation of the overpayment. After adjusting expenses provided by appellant, he denied waiver of recovery of the overpayment. The hearing representative found that appellant had not provided a "full picture of his active accounts"; that he did not provide current income documentation; and that he did not satisfactorily document his rental portfolio. Thus, he stated, "I am unable to determine his actual monthly income with any confidence." The hearing representative set a payment schedule.

By decision dated August 1, 2014, OWCP again advised appellant that his request for waiver of recovery of the overpayment was denied.

LEGAL PRECEDENT -- ISSUE 1

Section 8126 of FECA provides that the Secretary of Labor, on any matter within his jurisdiction under the subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.³ The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.⁴ In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the

³ 5 U.S.C. § 8126(1).

⁴ 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.⁵

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic market or other objective date mark) after the date of the original hearing request.⁶ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.⁷

ANALYSIS -- ISSUE 1

An OWCP hearing representative denied appellant's request for subpoenas, finding that appellant had not shown why he needed the subpoenas or why the evidence could not be obtained in some other manner. He noted that appellant had been found not at fault in the creation of the overpayment, so the employing establishment could not afford him any more protection. The hearing representative also noted that appellant failed to identify with any specificity what facts were to be obtained at the hearing.

The Board finds that the hearing representative acted within his discretion in denying the subpoena. By letter dated November 22, 2013, appellant requested that subpoenas be issued for six individuals at the employing establishment, including personnel staff and his supervisor. However, he provided no evidence as to the necessity of these witnesses to determine appellant's case. Documents submitted from the employing establishment established the proper rate of pay. Accordingly, the Board finds that the hearing representative properly determined that appellant did not establish that he needed the subpoenas.

LEGAL PRECEDENT -- ISSUE 2

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁸ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.

ANALYSIS -- ISSUE 2

Appellant was paid compensation with the wrong hourly rate during the period May 5 through July 13, 2013. He should have been paid compensation based on an hourly wage of \$25.31, but instead he was paid at the hourly rate of \$36.66. Appellant received \$11,035.05 in

⁵ *Id.*

⁶ 20 C.F.R. § 10.619(a)(1).

⁷ See *R.H.*, Docket No. 14-220 (issued May 2, 2014). *Claudio Vazquez*, 52 ECAB 496 (2001).

⁸ 5 U.S.C. § 8102(a).

compensation when he should have received \$7,618.58. This resulted in an overpayment of compensation in the amount of \$3,416.47. The Board affirms OWCP's determination that appellant received an overpayment in the amount of \$3,416.47.

LEGAL PRECEDENT -- ISSUE 3

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁹

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.¹⁰ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹¹

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹² Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.¹³

Section 10.438 of the regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial

⁹ 20 C.F.R. § 10.434. *See* 5 U.S.C. § 8129(b).

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004). *See Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

¹¹ *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹² 20 C.F.R. § 10.437(a)

¹³ *Id.* at § 10.437(b).

of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁴

ANALYSIS -- ISSUE 3

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁵

OWCP hearing representative determined that, as appellant's income greatly exceeded his expenses, he was not entitled to waiver of recovery of the overpayment. He noted some discrepancies in appellant's financial information. Nevertheless, when looking at appellant's own financial form, appellant listed monthly income of \$2,700.00 plus rental income of \$1,000.00 a month, for a total of income of \$3,700.00. He listed food of \$300.00 a month, utilities of \$300.00 a month, and other expenses of \$400.00 a month. Appellant noted that he made monthly payments to Chase Home Mortgage of \$600.00, Wells Fargo of \$300.00, GESA Credit Union of \$300.00; and U.S. Bank of \$400.00. The total monthly income listed was \$3,700.00 and total expenses were \$2,600.00. Accordingly, appellant's monthly income exceeded his documented reasonable monthly expenses by \$1,100.00. The Board finds that he is not entitled to waiver as he did not need substantially all of his income to meet current ordinary and necessary expenses.¹⁶

The Board, therefore, finds that OWCP properly concluded that recovery of the overpayment would not cause financial hardship to appellant and defeat the purpose of FECA. Moreover, as appellant made no argument that he gave up a valuable right or changed his position for the worse in reliance of the overpaid compensation, OWCP properly determined that recovery would not be against equity and good conscience. It properly denied waiver of the overpayment.

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁷ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment.¹⁸

CONCLUSION

The Board finds that OWCP properly denied appellant's request for subpoenas. The Board further finds that OWCP properly determined that he received an overpayment of

¹⁴ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

¹⁵ *Id.*

¹⁶ *See R.M.*, Docket No. 07-1066 (issued February 6, 2009).

¹⁷ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁸ *A.M.*, Docket No. 14-1885 (issued January 13, 2015).

compensation in the amount of \$3,416.47 for the period May 5 through July 13, 2013 because OWCP based its calculations on an incorrect hourly wage information and that OWCP properly denied waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 1 and July 25, 2014 are affirmed.

Issued: July 17, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board